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Supreme Court, U.S.
FILED

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No. ____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

DAVID G. MOORE, Petitioner

v

CITY OF WESTMINSTER, et. al., Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals below, disagreeing with its own previous case, other circuits and this Court, erred in dismissing a case for res judicata when the litigant did not receive a legitimate opportunity to litigate the 1983 claims in state court.

2. Whether the district court below, disagreeing with Federal Rules and their own appellate district's previous case, erred in dismissing a case when the litigant was unable to respond to a motion to dismiss for failure to state a claim due to a severe illness.

3. Whether the courts below, disagreeing with Title 42, U.S.C. §1988, the state's court, and this Court's previous decisions, awards attorney's fees and court costs to a defendant who prevails in a federal civil rights action when the plaintiff's action was not frivolous or vexatious.

4. Whether the courts below, disagreeing with Supreme Court's, Ninth Circuit and other areas' cases, erred by not recognizing that a hearing if required prior to the seizure of property, when no "special circumstances", exigent or extraordinary, exists.

5. If number 4 above is true, then is the California Vehicle Code and City of Westminster which permit the seizure of vehicles without a mandatory prior hearing, unconstitutional?

6. May a state and/or local government enact legislation nullifying a right to property guaranteed by both its state and federal constitutions ?

7. Is an administrative hearing, conducted by a division of local government, adequate to protect the rights of the accused?

LIST OF PARTIES

DAVID G. MOORE,
Petitioner

v

CITY OF WESTMINSTER; JERRY KENNEY, in his capacity as City Manager for the City of Westminster and as an individual; MIKE BOUVIER, in his capacity as Planning and Building Manager for the City of Westminster and as an individual; AL BRACKETT, in his capacity as a police officer for the City of Westminster and as an individual; JOHN LUPE, in his capacity as a Parking Enforcement Officer for the City of Westminster and as an individual; DELLA PESQUEIRA, in her capacity as License and Zoning Inspector for the City of Westminster and as an individual; MEDLIN'S TOWING, DAVID E. PANE, owner; CARR TOWING INC.; COUNTRY CITY TOWING;

Respondents

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IN THE

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October Term, 1997

DAVID G. MOORE,

Petitioner

v.

CITY OF WESTMINSTER, et. al.,

Respondents,

On Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Ninth Circuit

The petitioner respectfully petitions for a writ of certiorari or other appropriate order to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra,*) are unreported. The opinions of the district court (App., *infra*) are unreported. The opinions of the state court of appeals are unreported. The opinions of the state superior court (app., *infra*) are unreported.

Statement of Jurisdiction

The court of appeals entered its judgment on August 8, 1997 (App., *infra*,). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes, Rules and Regulations Involved

The California Vehicle Code §22660 et. seq. and Westminster Municipal Code § 8.44.010 et. seq. are lengthy and contained in the Appendix at pages A23 and A15 respectively.

Constitution of the United States, Amendment V:

...nor be deprived of life, liberty or property, without due process of law;...

Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United states and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The present action has its origin in an abatement process initiated by the City of Westminster against the petitioner, David Moore.

It began with alleged telephone calls from a few neighbors of petitioner to the city. These were recorded at the city on a form called a "Detail Report" and considered as complaints. (JA 173,174) There are only two of these unverified, unsigned "reports" and they were presented to plaintiff by defendants'-counsel just before trial. They were immediately proven to be totally false with sworn, signed declarations from the named persons on the "reports". (JA 218-232) Points and Authorities in Support of Objection to Evidence - Exhibits 2-a,b,c. Motion to Exclude (JA 215) was filed in a timely manner but ignored by the trial court (Judge Tully Seymour).

The city wrote letters to the petitioner stating that a city representative had made visits to plaintiff's residence and had observed inoperable vehicles stored in the required parking area on his property. Petitioner responded first by telephone and then in writing to these letters.

The field person for the city was Della PESQUEIRA, who immediately initiated an extremely unpleasant and hostile demeanor. She refused to disclose the sources of the alleged complaints explaining that the information could only be obtained through a judge. She also refused to make an appointment, at her convenience, to inspect the vehicles so that their operability could be demonstrated. Petitioner was just demanded to "move your cars". (JA 302 sworn "Declaration and Request for Judicial Notice") (JA 234 sworn "Declaration of David G. Moore in Support of Points and Authorities - Unconstitutional Ordinance and Statutes)

As just mentioned, the alleged complaints were later disclosed by the respondents' counsel, Mr. Ladikos, just before trial and turned out to be close friends (except 1) and neighbors of the petitioner. There were 2 "Detail Reports" and 1 typewritten internal memo consisting of hearsay allegations. When approached, all but one of the names contained on these documents emphatically denied knowledge or partici-

pation in them and signed sworn declarations attesting to their nonparticipation. The only other name mentioned turned out to be the neighborhood troublemaker whom I have known for over 20 years. He is an unemployed, only child of a neighbor living across the street that still resides with his parents at the age of about 36 years. Their house faces on a different street away from mine.

The petitioner alleges that the letters written by the city were misleading and confusing by drawing conclusions without substantiated facts and threatening prosecution under the penal code when action under their city ordinance was really their intentions.

When the vehicles were towed from the petitioner's residence, they were complete, intact and legally parked on his property. (JA 193) Four vehicles were initially targeted for seizure but one was saved because petitioner was home and its battery was charged. It soon sold for $3,800; certainly not a wreck. None of the vehicles was a derelict or created a hazard to passers-by.

Petitioner contends that he was not fully informed of the possible consequences of his actions as required by law so that he could prepare a proper defense prior to deprivation. Specifically, **at no time was he informed that his vehicles were irretrievable after seizure.** (JA 194)

PROCEEDINGS BELOW

Appellant filed a complaint pleading a first and primary cause of action for violation of the constitutional right to due process. Joint Appendix (JA 9-18). These facts are all related to the series of events that led to the seizure of his vehicles on February 19, 1991.(JA 9:24-13:20). Respondents were served on 3-5 and 3-6-92 (JA 27-35) and failed to file a timely response.

The first Request for Entry of Default - Court Judgment was filed with the Clerk of the Superior Court and mailed to Mr. Ladikos, attorney at law, on April 30, 1992. Mr. Ladikos had filed some papers with the court prior to this date but had not responded to the complaint. The Clerk rejected this first "default" explaining that the respondents had no attorney of record and instructed plaintiff to serve the respondents individually (RT 2:24). A second entry of default was filed on May 7, 1992.(JA 39-43)(RT 3:4).

Respondents' attorney, Mr. Ladikos filed a Motion for Demurrer on May 11, 1992 (JA 45-55) but it was put off calendar and not heard. Mr. Ladikos filed a Declaration re Representation on May 12, 1992 (JA 58), a Declaration of Costas A. Ladikos re Meet and Confer on May 12, 1992 (JA 61) a Notice of Evaluation Conference June 12, 1992 (JA 65), and a Notice of Continuance of Evaluation Conference October 28, 1992 (JA 69).

On November 6, 1992, Mr. Ladikos filed the Notice of Motion and Motion to Set Aside Default (JA 71-78), one day short of 6 months. On December 9, 1992, argument was heard and the default set aside (JA 91).

Argument was held on May 5, 1993 and continued until July 23, 1993. The trial court ruled that the petitioner had failed to prove that the Municipal Code of the City of Westminster, entitled Chapter 8.44 et seq. and relating to abandoned vehicles, is unconstitutional. It was the order of the Court that a judgment be entered in favor of the Respondents and against the Petitioner, DAVID G. MOORE.(JA 313) and was signed and filed on August 18, 1993. The Court also signed this order with the statement "The Defendants are hereby the prevailing party and are entitled to costs of suit to be filed with the Court." This was done over the opposition of Plaintiff's Objection to Judgment After Trial Prepared by Defendants' Attorney, Mr. Ladikos (JA 307) and filed on August 9, 1993, wherein *Hughes v. Rowe* (1980) 449 U.S. 5,

14-15 and *Benson v. Greitzer* (1990) 220 Cal.App.3d 11, 13; 269 Cal.Rptr. 201, 203, were cited as reasons why this was incorrect.

A timely notice of appeal to the state appellate court was filed October 15, 1993. (JA 318)

On October 25, 1994, the Court of Appeal affirmed the judgment of the Superior Court of Orange County, James P. Gray and Tully H. Seymour, Judges.

On December 6, 1994, a Petition for Review was filed with the California State Supreme Court. This was considered one day late by the clerk of the court and petition for late filing was forwarded immediately thereafter. Complexity and the need to cite all the errors of the appellate court were stated as reasonable grounds for being a day late (30 days of elapsed time with holidays and weekends adjustment).

The court refused to accept the filing and returned the paperwork postmarked December 13, 1994.

On December 18, 1995, a complaint was filed in the Federal District Court.

REASONS FOR GRANTING THE PETITION

This case deals with fundamental property and due process rights that are important to everyone. Over the last few years we have experienced a gradual and steady erosion of these basic rights to the point of causing irreparable harm. Your guidance in these fundamental areas will create needed uniformity and regularity in the judicial system.

The questions for review will now be discussed by number.

1. The issue of *res judicata*.

Adams v. Sevell, 946 F.2d 757, 762 (11th Cir. 1991).

This case deals with a former county employee's suit against county board of commissioners for allegedly discharging him in violation of his constitutional rights to substantive and procedural due process. At 762:

... However, the state court focused on the issue of

> settlement and limited its hearing to the evidence on that issue. Adams convinced the court that he had never agreed to a settlement, but the state court refused to judge the propriety of Adams's termination or the adequacy of the pre- and post-termination hearings provided by the County. ... Under these circumstances, res judicata does not apply because Adams did not receive a legitimate opportunity to litigate his section 1983 claims in state court. See *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 84, 104 S.Ct. 892, 898, 79 L.Ed.2d 56 (1984).

On page 1, line 10 of the Amended Complaint *Robinson v. Ariyoshi*, 753 F.2d 1468, (9th Cir. 1985) was cited.

This case has an extensive section dealing with res judicata beginning on page 1471. Here is mentioned *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). *See also District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482, 103 S.Ct. 1303, 1314, 75 L.Ed2d 206 (1983). These cites pertain to "horizontal" appeals to District Courts to overturn allegedly erroneous decisions on federal constitutional questions by the highest court of a state. Continuing:

> However, *Rooker* made it clear that the only constitutional questions arising from a state proceeding on which the Supreme Court considered itself to be the final arbiter were those that "actually arose in the cause" in which a full hearing was held and where the judgment was responsive to the issues. 263 U.S. at 415, 44 S.Ct. at 150. Otherwise, if *Rooker* were a blanket jurisdictional bar precluding the litigation of claims even if there had been no actual state court opportunity to litigate them, *Rooker* would swallow the "full and fair opportunity to litigate" limitation to res judicata clearly established elsewhere by the Supreme Court. *See e.g., Allen v. McCurry,* 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980).

Further along at 1472:

> In *Haring v. Prosise*, 462 U.S. 306, 103 S.Ct. 2368, 2373, 76 L.Ed.2d 595 (1983), the Supreme Court

noted that in a § 1983 action, collateral estoppel effect will not be given to a state court conclusion where the complaining party did not have full and fair opportunity to litigate a claim in state court or where the state court demonstrated inability or unwillingness to protect federal rights. (Additional cite not in Complaint from here on.) We do not hesitate to apply the same caveat in this res judicata context. The principle is fully consonant with the philosophy expressed in the Restatement of Judgments which provides for an exception to the general rule of preclusion where "[a] new determination of the issue is warranted by differences in quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them" *Restatement (Second) of Judgments* § 28(3).

Next in the case is a discussion of the *Feldman* doctrine followed by at 1473:

> ... Where a state court has refused to entertain federal constitutional claims, a federal court violates the precepts of neither subject matter jurisdiction nor res judicata by hearing those claims.

The foregoing cited cases appear to be clear indications of exceptions to the concept of res judicata.

2. Litigant unable to respond to a motion to dismiss due to severe illness.

PRO SE REQUIREMENT TO ANSWER MOTION TO DISMISS

Although not of this circuit, it appears that a *pro se* plaintiff may not be required to respond to a defendant's motion as follows: *Curtis v. Bembenek,* 48 F.3d 281, 287 (7th Cir. 1995),

> Under Rule 56(e), the party opposing a motion for summary judgment may not rest upon the mere allegations or denials of his or her pleadings; unless the nonmoving party counters with affidavits of his or her own, the facts asserted in the movant's affidavits will

be treated as true. Similarly, Rule 12(b) provides that if a court, on a motion to dismiss, considers matters outside the pleading, the court shall treat the motion as one for summary judgment, and the nonmovant must be given a "reasonable opportunity" to contradict the material facts asserted by the moving party.

Significantly, however, Rule 12(b) "says nothing about a `reasonable opportunity' to contradict when dismissal motions are not treated as summary judgment motions." *English v. Cowell,* 10 F.3d 434, 437 (7th Cir.1993). Although Curtis was entitled to submit papers in opposition to the defendant's motion, it was also appropriate for him to rely on his pleadings. A *pro se* plaintiff who has alleged well-pled facts supporting a claim for relief can withstand dismissal without responding to a motion to dismiss. ... The plaintiff can simply rest on the assumed truthfulness and liberal construction afforded his complaint. Unlike the summary judgment context, the nonmovant's lack of response to a motion to dismiss constitutes no admission of the proponent's factual assertions.

Respondents' motion contains no affidavits but petitioner has filed a verified complaint. From *Schroeder v. McDonald,* 41 F.3d 1272 (9th Cir. 1994):

> A verified complaint may be used as an opposing affidavit under Rule 56. *McElyea v. Babbit,* 833 F.2d 196, 197-98 (9th Cir. 1987)(per curiam).

In *Zinermon v. Bursh,* 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100, the Court reviewed a case that had been dismissed under Rule 12(b)(6). The case pertained to the narrow issue of the admission of a mental patient to a hospital in the State of Florida. The complaint alleged that they violated state law by admitting him as a voluntary patient when they knew or should have known that he was incompetent to give informed consent to his admission, and that their failure to initiate Florida's involuntary placement procedure denied him constitutionally guaranteed procedural safeguards. The court held that the complaint was sufficient to state a claim under § 1983 for violation of his procedural due process rights.

The Court's reasoning was similar to *Freeman v. Blair* 793 F.2d 166, 178, and petitioner's complaint and. in fact mentioned *Freeman* in footnote 2 at the bottom of page 978. Both cases pertain to the requirement for predeprivation hearings.

ILLNESS AS EXCUSABLE NEGLIGENCE FOR NOT FILING OPPOSING MOTION

Petitioner was ill and unable to research, prepare or file a timely response to defendants' motion.

I saw my doctor on May 2, 1996, complaining of the symptoms of the chest cold. I again saw my doctor again on May 14, 1996 as my cold had not significantly improved. The defendants' council filed their Motion to Dismiss on May 7, 1996. The District Court and respondents' council have copies of my doctor's sworn declaration attesting to the above.

The only applicable case that this petitioner could find was in West's United States Code Annotated, Title 28, Federal Rules of Civil Procedure, Volume Rules 57 to 60. Under Rule 60, note 560 on page 473 was cited, *Ken-Mar Airpark, Inc. v. Toth Aircraft & Accessories Co.,* 12 F.R.D. 399 (D.C.Mo.1952). At 400:

> ...the personal defendant has appended a doctor's certificate in support of his affidavit that he was ill and in bed for several days prior to and at the time the default judgment was entered and that because of such illness he was totally unable to appear in court. This would be excusable negligence perforce the provisions of said Rule 60.

At *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983), The Standard for Rule 60(b)(1) Relief,

> In determining whether Rule 60(b) applies, courts should be mindful that the rules are to be construed to achieve the just determination of every action. Fed.R. Civ.P.1. "It is well settled that the Federal Rules of Civil Procedure are to be liberally construed to effectuate the general purpose of seeing that cases

are tried on the merits and to dispense with technical procedural problems." (cite omitted). "[S]peaking generally, [the considerable body of federal decisions has] been in marked harmony with the proposition that 60(b) is a remedial rule to be liberally construed." (cite omitted).

Recently, in *In re Magouirk*, 693 F.2d 948, 951 (9th Cir.1982) we stated:

Under Rule 60(b), "excusable neglect" is liberally construed, especially in those instances where the order or judgment forecloses trial on the merits of a claim.

The respondents former counsel, Kimberly Barlow, was the attorney of record when this action was dismissed by the district court. She so misquoted and misstated my writings, the facts and legal citations that a complaint was included on page 9 of the Informal Opening Brief.

The district judge's opinion in the appendix makes reference to my not calling her regarding my illness. I was so angry at the flagrant distortions that it was the furthest from my mind to call.

The district court judge also took judicial notice (§201) of items in a motion from Ms. Barlow that was filed with the motion to dismiss. These items were clearly in controversy and disputed in my Amended Complaint. The district court judge knew or should have known that this was not permissible under that rule.

3. 42 U.S.C. § 1988 in effect states that defendants are not entitled to legal fees should the plaintiff not prevail unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. No court has made such a finding even though this plaintiff formally pled this issue to the state court, before the issuance of its decision, the state appellate court and the state supreme court, who refused to review this case. The state court signed the decision awarding costs to defendants and the state appellate court affirmed it even though they know this violates federal and state law ! *Benson v. Greitz-*

er, 220 Cal.App.3d 11, 13 (2 Dist. 1990), *Hughes v. Rowe* (1980) 449 U.S. 5, 14-15, 101 S.Ct. 173, 178-179, 66 L.Ed.2d 163. (Unwilling to protect federal rights.) (See Amended Complaint page 4, line 9, and 8:22).

This appears to be a real "litmus" test of the fairness and honesty of the Courts. The issue is so well settled that any Court refusing to conform is clearly beyond the sphere of proper jurisprudence.

4.&5. There must be a full hearing before deprivation of property when no extraordinary situations exist.(See Opening Brief 4:28)

The district court granted summary judgment for appellees... because they deprived vehicle owners of the use of their vehicles without prior notice or hearing and did not involve one of those "extraordinary situations" justifying deprivation of a property interest without prior notice and hearing. *Stypmann v. City & Cty of San Francisco* (1977) 557F.2d 1338, 1341.

> Nevertheless, where official action seriously interferes with property rights and the validity and reasonableness of that action may be open to question, and there is no need for immediate action, due process requires a prior hearing at which the vehicle owner may contest the planned action. *Graff v. Nicholl* (1974) 370 F.Supp. 974, 984.
>
> Where administrative agency adjudicates private property rights and obligations, parties must be afforded an opportunity to be heard, and, if private rights cannot otherwise be protected and there is no compelling public interest for summary action, there must be a full hearing before administrative action. *Tafaro's Investment Co. v. Division of Housing Improvement* (1972) La., 259 So.2d 57, 58. (emphasis added)
>
> Thus predeprivation notice and hearing represent the norm and the state must forward important reasons to justify a departure therefrom. *Miller v. City of Chicago* (1985) 774 F.2d 188, 191.

The above case law is in direct opposition to the opinion of the lower court that heard my case even though all these citations were presented in my moving papers (RT 100:3)(RT 55:23). *Zinermon v. Burch* is U.S. Supreme Court law that .fl 13
further supports this position (1990 case fully cited and quoted on page 3 of my opening brief.) RT 87 - 106 clearly shows the position of the state trial court in this matter.

The Court framed the question at (RT 77:18):

> ...The issue, as I see it, is whether the City of Westminster was bound by fundamental constitutional due process requirements to hold a mandatory administrative hearing, regardless of whether one was requested by Mr. Moore, and to make factual findings that these vehicles in fact were public nuisances subject to abatement.

The Court later stated its position at (RT 94:+) that in essence the city was not required to provide a hearing unless asked. It further stated that there was no case supporting my position for a mandatory hearing before deprivation (RT 98:25). Even with the cited cases, this judge's mind was made up before my appearance probably due to his previous "experience". This alleged trial was a sham! (Clear unwillingness to provide due process - fair trial).

Many of the issues and case law herein discussed originated in your Court but it appears many of the regions have strayed from your concepts.

This case presents a genuine opportunity for this Court to address the disputed issues and to bring much needed certainty and uniformity to the judicial system.

CONCLUSION

The petition for a writ should be granted to correct the many inequities.

Respectfully Submitted,

DAVID G. MOORE
Petitioner in pro per

January, 1998

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID G. MOORE, Plaintiff-Appellant, v. CITY OF WESTMINSTER; JERRY KENNEY, in his official capacity as City Manager for the City of Westminster and individually; MIKE BOUVIER, in his capacity as Planning and Building Manager for the City of Westminster and individually; AL BRACKETT, in his capacity as police officer for the City of Westminster and individually; JOHN LUPE, in his capacity as a Parking Enforcement Officer for the City of Westminster and individually; DELLA PESQUEIRA, in her capacity as License and Zoning Inspector for the City of Westminster and individually; MEDLIN'S TOWING, DAVID E. PANE, owner; CARR TOWING INC.; COUNTRY CITY TOWING; Defendants-Appellees.	No. 96-56215 D.C. No. CV-95-01093-AHS Central California (Santa Ana) ORDER

Before: GOODWIN, SCHROEDER, and TASHIMA,
Circuit Judges.

The panel denies appellant's petition for rehearing.

Judges Schroeder and Tashima vote to reject the appellant's suggestion for rehearing en banc and Judge Goodwin so recommends.

[page 2]

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

Accordingly, the suggestion for rehearing en banc is rejected.

ORIGINAL
NOT FOR PUBLICATION

FILED
JUN 19 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID G. MOORE, Plaintiff-Appellant, v. CITY OF WESTMINSTER; JERRY KENNEY, in his official capacity as City Manager for the City of Westminster and individually; MIKE BOUVIER, in his capacity as Planning and Building Manager for the City of Westminster and individually; AL BRACKETT, in his capacity as police officer for the City of Westminster and individually; JOHN LUPE, in his capacity as a Parking Enforcement Officer for the City of Westminster and individually; DELLA PESQUEIRA, in her capacity as License and Zoning Inspector for the City of Westminster and individually; MEDLIN'S TOWING, DAVID E. PANE, owner; CARR TOWING INC.; COUNTRY CITY TOWING; Defendants-Appellees.	No. 96-56215 D.C. No. CV-95-01093-AHS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Submitted June 17, 1997**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a), 9th Cir. R. 34-4

[page 2]

Before: GOODWIN, SCHROEDER, and TASHIMA, Circuit Judges.

David G. Moore appeals pro se the district court's dismissal of his 42 U.S.C. §§ 1983, 1985 civil rights action alleging that the defendants violated his constitutional rights by seizing several of his automobiles. Moore claims that the Westminster Municipal Code ("Code"), pursuant to which the defendants seized his vehicles, violates the Due Process Clause. Moore also appeals the district court's denial of his Fed. R. Civ. P. 60(b) motion for reconsideration. We have jurisdiction pursuant to 28 U.S.C. §1291 and affirm.

The district court dismissed Moore's action pursuant to a local rule after Moore failed to file a timely opposition to the defendants' motion to dismiss. We need not decide whether such a dismissal was proper here because the record demonstrates that Moore's action is barred by res judicata. See Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th

Cir. 1989) (stating that this court may affirm the district court's judgment on any ground finding support in the record); Clark v. Yosemite Community College Dist., 785 F.2d 781, 784 (9th Cir. 1986) (holding that "a federal court must give [a] state court judgment the same full faith and credit as it would be entitled to in the courts of the state in which it was entered"); Slater v. Blackwood, 543 P.2d 593, 594 (Cal. 1975) (stating that "[a] valid final judgment on the merits in favor of a defendant serves as a complete bar to further litigation on the same cause of action").

To the extent that Moore contends that the district court judge in this case was biased, we reject this contention because

[page 3]

Moore has failed to offer any support for this contention. Because Moore's action is barred by res judicata, we need not address whether the district court properly denied his motion for reconsideration.

Affirmed.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CIVIL MINUTES - GENERAL

Case No. SA CV 95-1093 AHS (EEx) Date May 28, 1996

Title David G. Moore v. City of Westminster et al.

DOCKET ENTRY

[I hereby certify that this document was served by first class mail or Government messenger service, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date.]

Date: 5/29/96 Deputy Clerk S/ Paul Pierson

PRESENT:

HON. ALICEMARIE H. STOTLER, JUDGE

Paul D. Pierson	Not Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

None present

ATTORNEYS PRESENT FOR DEFENDANTS:

None present

PROCEEDINGS: (In Chambers) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On May 7, 1996, defendants filed a motion to dismiss for failure to state a claim. The motion was noticed for hear-

ing on the Court's June 3, 1996, calendar. Opposition was due no later than May 20, 1996, under this District's Local Rule 7.6. Plaintiff has filed no opposition.

Under Local Rule 7.9, a party's failure to timely file required opposition to a motion may be deemed consent to the granting of that motion. Because plaintiff has failed to file any opposing papers, as required by Local Rule 7.6, the Court deems plaintiff's inaction consent to the granting of defendants' motion.

Accordingly, the Court grants defendants' motion to dismiss and removes the matter from the Court's June 3, 1996, hearing calendar. Defendants' request for judicial notice is granted, except as to Exhibit C which appears to be unrelated. Counsel for defendants shall prepare, serve and lodge a proposed Order consistent with the foregoing. See Local Rule 14.1. Compliance with Local Rule 3.4.1 is required.

The Clerk shall serve this minute order on all parties in this action. A copy of this order may be transmitted by facsimile.

MINUTES FORM 11 INITIALS OF DEPUTY CLERK PP
CIVIL - GEN WLP D - M

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CIVIL MINUTES - GENERAL

Case No. SA CV 95-1093 AHS (EEx) Date May 28, 1996

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DOCKET ENTRY

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Date: 5/29/96 Deputy Clerk S/ Paul Pierson

==========

PRESENT:

HON. ALICEMARIE H. STOTLER, JUDGE

Paul D. Pierson	Not Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

None present

ATTORNEYS PRESENT FOR DEFENDANTS:

None present

PROCEEDINGS: (In Chambers) ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

On June 17, 1996, plaintiff filed a Motion to Set Aside Defendants' [Proposed] Order and/or Motion to Dismiss for

Failure to State a Claim . . . Motion for Reconsideration. On July 1, 1996, defendants' filed opposition. Plaintiff filed opposition to defendants' opposition on July 8, 1996. The matter was noticed for hearing on the Court's July 15, 1996, calendar.

The Court, having received, read and considered the foregoing, finds the matter appropriate for submission on the papers without oral argument. See Local Rule 7.11 (the Court may dispense with oral argument on any matter unless otherwise required) ; Fed. R. Civ. P. 78. The matter is, therefore, removed from the Court's July 15, 1996, hearing calendar.

A. The Parties' Contentions

Plaintiff moves the Court to reconsider its June 19, 1996 Order Granting Defendants' Motion to Dismiss. Plaintiff argues that he was unable to file a timely response to defendants' motion due to a severe respiratory cold. Plaintiff contends that this illness constitutes excusable neglect under Federal Rule of Civil Procedure 60(b). Plaintiff further asserts that as a pro se plaintiff with a well-pleaded Complaint, he was not required to respond to defendants' motion.

Defendants oppose plaintiff's motion, arguing that plaintiff's "severe cold" does not constitute a basis for setting aside the Court's order. Defendants argue that plaintiff's Complaint was properly dismissed on the merits and thus the present motion should be denied. Defendants dispute plaintiff's contention that he was not required to respond to defendants' motion. Defendants contend that the cases plaintiff relies on in support of this notion are inapplicable here since they are limited to the summary judgment context.

B. Discussion of Applicable Legal Principles

A motion for reconsideration requires the moving party to show: (a) discovery of new facts or law that a reasonably

diligent moving party could not have known about, (b) emergence of new facts or law after the decision, or (c) a manifest showing that the Court failed to consider material facts presented to the Court. Local Rule 7.16. See also Fed. R. Civ. P. 60(b) (court has discretion to relieve a party of a final order due to "mistake, inadvertence, surprise, or excusable neglect").

After applying the foregoing standard to the facts of this case, the Court concludes that plaintiff's motion for reconsideration is not well taken. Plaintiff has presented no new facts or law that would warrant the Court's reconsideration of its order granting defendants' motion to dismiss. In addition, plaintiff has made no showing that, in granting defendants' motion, the Court failed to consider material facts presented to the Court. Plaintiff "severe respiratory cold" does not constitute excusable neglect under Federal Rule of Civil Procedure 60(b) or Local Rule 7.16. Although plaintiff contends that this illness prevented him from venturing to the law library to perform the necessary research to oppose defendants' motion (Moore Decl. at p.2), he does not explain why he was unable to seek a stipulation from opposing counsel, or seek a continuance from the Court. For this reason, plaintiff's motion for reconsideration pursuant to Federal Rule of Civil Procedure 60(b) is denied.

Plaintiff's contention that a pro so plaintiff with a well-pleaded complaint need not respond to a motion to dismiss is similarly unavailing. As defendants assert, the cases plaintiff relies on in support of this proposition are inapplicable here since they are limited to the summary judgment context. In this case, the Court's consideration of facts susceptible to judicial notice did not convert defendants' motion to dismiss into a motion for summary judgment. See Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986) (finding that a court may look beyond a complaint to judicially noticed matters of public record in determining a motion to dismiss

without having to convert it to a motion for summary judgment). Plaintiff, although appearing pro se, was bound by Local Rule 7.6, which requires the opposing party to file opposition not later than fourteen (14) days prior to the motion hearing date. See Local Rule 1.2 ("Persons appearing pro se are bound by these rules..."). Plaintiff failed to comply with the Local Rules. Accordingly, plaintiff's motion to set aside the Court's order is denied.

C. Conclusion

For the foregoing reasons, the Court denies plaintiff's Motion to Set Aside Defendants' [Proposed] Order and/or Motion to Dismiss for Failure to State a Claim . . . Motion for Reconsideration.

The Clerk shall serve this minute order on counsel for all parties in this action. A copy of this order may be transmitted by facsimile.

MINUTES FORM 11 INITIALS OF DEPUTY CLERK_
CIVIL - GEN WLP D - M

[Note: The above is unsigned by the presiding judge.]

LAW OFFICES OF COSTAS A. LADIKOS
Three Pointe Drive, Suite 120
Brea, California 92621-3648
State Bar No. 92783
(714) 255-7000
Attorney for Defendants,
CITY OF WESTMINSTER, et al.

FILED
AUG 18 1993
GARY L. GRANVILLE, County Clerk
By_____DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

DAVID G. MOORE Plaintiff, v. CITY OF WESTMINSTER; JERRY KENNEY, in his official capacity as City Manager for the City of Westminster and individually; MIKE BOUVIER, in his capacity as Planning and Building Manager for the City of Westminster and individually; AL BRACKETT, in his capacity as police officer for the City of Westminster and individually; JOHN LUPE, in his capacity as a Parking Enforcement Officer for the City of Westminster and individually; DELLA PESQUEIRA, in her capacity as License and Zoning Inspector for the City of Westminster and individually; MEDLIN'S TOWING, DAVID E. PANE, owner; CARR TOWING INC.; COUNTRY CITY TOWING; Defendants-Appellees.	Case No.67 60 77 JUDGMENT AFTER COURT TRIAL HON. TULLY H. SEYMOUR, JUDGE PRESIDING DEPARTMENT 7

TO: ALL INTERESTED PARTIES:

On July 23, 1993, the Plaintiff, DAVID G. MOORE, was present in court and in Propria Persona. The Defendants, CITY OF

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WESTMINSTER; JERRY KENNEY,in his capacity as City Manager for the City of Westminster and as an individual; MIKE BOUVIER, in his capacity as Planning and Building Manager for the City of Westminster and as an individual; AL BRACKETT,in his capacity as a police officer for the City of Westminster and as an individual; JOHN LUPE, in his capacity as a Parking Enforcement Officer for the City of Westminster and as an individual; DELLA PESQUEIRA, in her capacity as License and Zoning Inspector for the City of Westminster and as an individual; MEDLIN'S TOWING, DAVID E. PANE, owner; CARR TOWING, INC.; and COUNTRY CITY TOWING; hereafter referred to as Defendants, were represented by the LAW OFFICES OF COSTAS A. LADIKOS, BY COSTAS A. LADIKOS. The above entitled matter was called in Department 7 of the above entitled Court by the Honorable TULLY H. SEYMOUR, Judge Presiding.

The Court, after having heard previous evidence and arguments as well as documents filed in the above entitled case, hereby rules as follows:

The Plaintiff, DAVID G. MOORE, has failed to prove that the Municipal Code of the City of Westminster, entitled Chapter 8.44 et seq. and relating to abandoned vehicles, is unconstitutional. It is, therefore, the order of this Court that judgment be entered in favor of the Defendants and against the Plaintiff, DAVID G. MOORE, In Propria Persona.

[page 3]

The Defendants are hereby the prevailing party and are

entitled to costs of suit to be filed with the Court.

DATED: __AUG 18 1993__ __TULLY H. SEYMOUR__
HONORABLE TULLY H. SEYMOUR,
Judge of the Superior Court

8.44.010 Findings and declarations. In addition to and in accordance with the determination made and the authority granted by the state of California under Section 22660 of the Vehicle Code to remove abandoned, wrecked, dismantled or inoperative vehicles, or parts thereof, as public nuisances, the city council makes the following findings and declarations:

The accumulation and storage of abandoned, wrecked, dismantled or inoperative vehicles, or parts thereof, on private or public property not including highways is found to create a condition tending to reduce the value of private property; to promote blight and deterioration; to invite plundering; to create fire hazards; to constitute an attractive nuisance creating a hazard to the health and safety of minors; to create and harborage for rodents and insects; and to be injurious to the health, safety and general welfare. Therefore, the presence of an abandoned, wrecked, dismantled or inoperative vehicle, or parts thereof, on private or public property not including highways, except as expressly permitted in this chapter, is declared to constitute a public nuisance, which may be abated as such in accordance with the provisions of this chapter.

8.44.020 Definitions. For the purposes of this chapter, the following terms shall have the following meanings, unless it is clear from the context that a different meaning is intended:

A. "Highway" means a way or place, of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street.

B. "Owner" of the land" means the owner of the land on which the vehicle, or parts thereof, is located, as shown on the last equalized assessment roll.

C. "Owner of the vehicle" means the last registered owner and legal owner of record.

D. "Public property" does not include "highway."

E. "Vehicle" means a device by which any person or property may be propelled, moved and drawn upon a highway, except a device moved by human power or used exclusively upon stationary rails or tracks.

8.44.030 Exemptions.

A. This chapter shall not apply to:

1. A vehicle, or parts thereof, which is completely enclosed within a building in a lawful manner where it is not visible from the street or other public or private property; or

2. A vehicle, or parts thereof, which is stored or parked in a lawful manner on private property in connection with the business of a licensed dismantler, licensed vehicle dealer, junk dealer, or when such storage or parking is necessary to the operation of a lawfully conducted business or commercial enterprise.

B. Nothing in this section shall authorize the maintenance of a public or private nuisance, as defined under provisions of law other than Chapter 10 (commencing with Section 22650) of Division 11 of the Vehicle Code and this chapter.

C. This chapter is not the exclusive regulation of abandoned, wrecked, dismantled or inoperative vehicles within the city. It shall supplement and be in addition to the other regulatory codes, statutes and ordinances heretofore or hereafter enacted by the city, the state, or any other legal entity or agency having jurisdiction.

8.44.040 Enforcement. Except as otherwise provided herein, the provisions of this chapter shall be administered and enforced by the city administrator. In the enforcement of this chapter, such officer and his deputies may enter upon private or public property to examine a vehicle or parts thereof, or to obtain information as to the identity of a vehicle, and to remove or cause the removal of a vehicle or parts thereof

declared to be a nuisance pursuant to this chapter.

8.44.050 Franchise--Right of entry for removal. When the city council has contracted with or granted a franchise to any person or persons, such person or persons shall be authorized to enter upon private property or public property to remove or cause the removal of a vehicle or parts thereof declared to be a nuisance pursuant to this chapter.

8.44.060 Administrative cost determination. The city council shall from time to time determine and fix an amount to be assessed as administrative costs (excluding the actual cost of removal of any vehicle or parts thereof) under this chapter.

8.44.070 Abatement--Authorization. Upon discovering the existence of an abandoned, wrecked, dismantled or inoperative vehicle, or parts thereof, on private property or public property within the city, the city administrator shall have the authority to cause the abatement and removal thereof in accordance with the procedure prescribed in this chapter.

8.44.080 Abatement--Notice. A ten-day notice of intention to abate and remove the vehicle, or parts thereof, as a public nuisance shall be mailed by registered mail to the owner of the land and to the owner of the vehicle, unless the vehicle is in such condition that identification numbers are not available to determine ownership. The notices of intention shall be in substantially the following forms:

A. "NOTICE OF INTENTION TO ABATE AND REMOVE AN ABANDONED, WRECKED, DISMANTLED, OR INOPERATIVE VEHICLE OR PARTS THEREOF AS A PUBLIC NUISANCE

(Name and address of owner of the land)

"As owner shown on the last equalized assessment roll of the land located at (address), you are hereby notified that the undersigned pursuant to Section 8.44.070 of the Westminster Municipal Code has determined that there exists upon said land an (or parts of an) abandoned, wrecked, dismantled or inoperative vehicle registered to _____, license number _____, which constitutes a public nuisance pursuant to the provisions of (ordinance or municipal code chapter number).

"You are hereby notified to abate said nuisance by the removal of said vehicle (or said parts of a vehicle) within 10 days from the date of mailing of this notice, and upon your failure to do so the same will be abated and removed by the City of Westminster and the costs thereof, together with administrative costs, assessed to you as owner of the land on which said vehicle (or said parts of a vehicle) is located.

"As owner of the land on which said vehicle (or said parts of a vehicle) is located, you are hereby notified that you may, within 10 days after the mailing of this notice of intention, request a public hearing and if such a request is not received by the City Administrator within such 10-day period, the City Administrator shall have the authority to abate and remove said vehicle (or said parts of a vehicle) as a public nuisance and assess the costs as aforesaid without a public hearing. You may submit a sworn written statement within such 10-day period denying responsibility for the presence of said vehicle (or said parts of a vehicle) on said land with your reasons for denial, and such statement shall be construed as a request for hearing at which your presence is not required. You may appear in person at any hearing requested by you or the owner of the vehicle or, in lieu thereof, may present a sworn written statement as aforesaid in time for consideration at such meeting.

"Notice Mailed_____ s/_____
(date) City Administrator"

B. "NOTICE OF INTENTION TO ABATE AND REMOVE AS ABANDONED, WRECKED, DISMANTLED OR INOPERATIVE VEHICLE OR PARTS THEREOF AS A PUBLIC NUISANCE

(Name and address of last registered and/or legal owner of record of vehicle -- notice should be given to both if different)

"As last registered (and/or legal) owner of record of (description of vehicle - make, model, license, etc.), you are hereby notified that the undersigned pursuant to Chapter 8.44. of Article IV of the Westminster Municipal Code has determined that said vehicle (or parts of a vehicle) exists as an abandoned, wrecked, dismantled or inoperative vehicle at (describe location on public or private property) and constitutes a public nuisance pursuant to the provisions of said municipal code.

"You are hereby notified to abate said nuisance by the removal of said vehicle (or said parts of a vehicle) within 10 days from the date of mailing of this notice.

"As registered (and/or legal) owner of record of said vehicle (or said parts of a vehicle), you are hereby notified that you may, within 10 days after the mailing of this notice of intention, request a public hearing if such a request is not received by the Planning Commission within such 10-day period, the City Administrator shall have the authority to abate and remove said vehicle (or said parts of a vehicle) without a hearing.

"Notice Mailed _____ s/_____
(date) City Administrator

8.44.090 Abatement--Hearing--Notice.

A. Upon request by the owner of the vehicle or owner

of the land, received by the city administrator within ten days after the mailing of notices of intention to abate and remove, a public hearing shall be held by the planning commission on the question of abatement and removal of the vehicle, or parts thereof, as an abandoned, wrecked, dismantled or inoperative vehicle, and the assessment of the administrative costs and the costs of removal of the vehicle, or parts thereof, against the property on which it is located.

B. If the owner of the land submits a sworn written statement denying responsibility for the presence of the vehicle on his land within such ten-day period, said statement shall be construed as a request for a hearing, which does not require his presence. Notice of the hearing shall be mailed, by registered mail, at least ten days before the hearing, to the owner of the land and to the owner of the vehicle, unless the vehicle is in such condition that identification numbers are not available to determine ownership. If such a request for a hearing is not received within ten days after mailing of the notice of intention to abate and remove, the city shall have the authority to abate and remove the vehicle, or parts thereof, as a public nuisance, without holding a public hearing.

C. All hearings under this chapter shall be held before the planning commission, which shall hear all facts and testimony it deems pertinent. Said facts and testimony may include testimony on the condition of the vehicle, or parts thereof, and the circumstances concerning its location on the private property or public property. The planning commission shall not be limited by the technical rules of evidence. The owner of the land may appear in person at the hearing, or present a sworn written statement in time for consideration at the hearing, and deny responsibility for the presence of the vehicles on the land, with his reasons for such denial.

D. The city council may impose such conditions and take such other action as it deems appropriate under the circumstances to carry out the purposes of this chapter. It may delay the time for removal of the vehicle, or parts thereof, if

in its opinion, the circumstances justify it. At the conclusion of the public hearing, the planning commission may find that a vehicle, or parts thereof, has been abandoned, wrecked, dismantled or is inoperative on private or public property, and order the same removed from the property as a public nuisance and disposed of, as provided in this chapter, and determine the administrative costs and the cost of removal to be charged against the owner of the land. The order requiring removal shall include a description of the vehicle, or parts thereof and the correct identification number and license number of the vehicle, if available at the site.

E. If it is determined at the hearing that the vehicle was placed on the land without the consent of the owner of the land and that he has not subsequently acquiesced in its presence, the planning commission shall not assess the costs of administration or removal of the vehicle against the property upon which the vehicle is located, or otherwise attempt to collect such costs from such owner of the land.

F. If the owner of the land submits a sworn written statement denying responsibility for the presence of the vehicle on his land but does not appear, or if an interested party makes a written presentation to the planning commission but does not appear, he shall be notified in writing of the decision.

8.44.100 Abatement--Appeal.

A. Any interested party may appeal the decision of the planning commission by filing a written notice of appeal with the city clerk within five days after its decision.

B. Such appeal shall be heard by the city council, which may affirm, amend or reverse the order, to take other action deemed appropriate.

C. The clerk shall give written notice of the time and place of the hearing to the appellant and those persons specified in Section 8.44.080.

D. In conducting the hearing, the city council shall not be limited by the technical rules of evidence.

8.44.110 Removal--Procedure. Five days after adoption of the order declaring the vehicle, or parts thereof, to be a public nuisance, five days from the date of mailing of notice of the decision if such notice is required by Section 8.44.090, or fifteen days after such action of the governing body authorizing removal following appeal, the vehicle, or parts thereof, may be disposed of by removal to a scrapyard or automobile dismantler's yard. After a vehicle has been removed, it shall not thereafter be reconstructed or made operable, unless after removal, the vehicle becomes qualified and has issued for it a horseless carriage or historical vehicle license.

8.44.120 Removal--Notice to Department of Motor Vehicles. Within five days after the date of removal of the vehicle, or parts thereof, notice shall be given to the Department of Motor Vehicles identifying the vehicle, or parts thereof, removed. At the same time, there shall be transmitted to the Department of Motor Vehicles any evidence of registration available, including registration certificates, certificates of title and license plates.

8.44.130 Removal--Cost assessment. If the administrative costs and the cost of removal which are charged against the owner of a parcel of land pursuant to Section 8/44/080 are not paid within thirty days of the date of the order or the final disposition of an appeal therefrom, such costs shall be assessed against the parcel of land pursuant to Section 38773.5 of the Government Code, and shall be transmitted to the tax collector for collection. Said assessment shall have the same priority as other city taxes. (Ord. 18867 §8, 1978).

§ 22660. Local ordinances

Notwithstanding any other provision of law, a city, county, or city and county may adopt an ordinance establishing procedures for the abatement and removal, as public nuisances, of abandoned, wrecked, dismantled, or inoperative vehicles or parts thereof from private or public property, and for the recovery, pursuant to Section 25845 or 38773.5 of the Government Code, or assumption by the local authority, of costs of administration and the removal.

Amended Stat 1988 ch 126 sec 1.

Amendments:

1988 Amendment: (1) Deleted "not including highways;" after "public property"; and (2) substituted "the" for "such" after "administration and".

Witkin Summary (9th ed) Personal Property § 29.

§ 22661. Contents of ordinance

Any ordinance establishing procedures for the removal of abandoned vehicles shall contain all of the following provisions:

(a) The requirement that notice be given to the Department of Motor Vehicles within five days after the date of removal, identifying the vehicle or part thereof and any evidence of registration available, including, but not limited to, the registration card, certificates of ownership, or license plates.

(b) Making the ordinance inapplicable to (1) a vehicle or part thereof which is completely enclosed within a building in a lawful manner where it is not visible from the street or other public or private property or (2) a vehicle or part thereof which is stored or parked in a lawful manner on private property in connection with the business of a licensed dismantler, licensed vehicle dealer, or a junkyard. This exception shall not, however, authorize the maintenance of a public or private nuisance as defined under provisions of law other than this chapter.

(c) The requirement that not less than a 10-day notice of intention to abate and remove the vehicle or part thereof as a public nuisance be issued, unless the property owner and the owner of the vehicle have signed releases authorizing removal and waiving further interest in the vehicle or part thereof. However, the notice of intention is not required for removal of a vehicle or part thereof which is inoperable due to the absence of a motor, transmission, or wheels and incapable of being towed, is valued at less than two hundred dollars ($200) by a person specified in Section 22855, and is determined by the local agency to be a public nuisance presenting an immediate threat to public health or safety, provided that the property owner has signed a release authorizing removal and waiving further interest in the vehicle or part thereof. Prior to final disposition under Section 22662 of such a low-valued vehicle or part for which evidence of registration was recovered pursuant to subdivision (a), the local agency shall provide notice to the registered and legal owners of intent to dispose of the vehicle or part, and if the vehicle or part is not claimed and removed within 12 days after the notice is mailed, from a location specified in Section 22662, final disposition may proceed. No local agency or contractor thereof shall be liable for damage caused to a vehicle or part thereof by removal pursuant to this section.

This subdivision applies only to inoperable vehicles located upon a parcel the is (1) zoned for agricultural use or (2) not improved with a residential structure containing one or more dwelling units.

(d) The 10-day notice of intention to abate and remove a vehicle or part thereof, when required by this section, shall contain a statement of the hearing rights of the owner of the property on which the vehicle is located and of the owner of the vehicle. The statement shall include notice to the property owner that he may appear in person at a hearing or may submit a sworn written statement denying responsibility for the presence of the vehicle on the land, with his reasons for such denial, in lieu of appearing. The notice of intention to abate

shall be mailed, by registered or certified mail, to the owner of the land as shown on the last equalized assessment roll and to the last registered and legal owners of record unless the vehicle is in such condition that identification numbers are not available to determine ownership.

(e) The requirement that a public hearing be held before the governing body of the city, county, or city and county, or any other board, commissioner, or official of the city, county, or city and county as designated by the governing body, upon request for such a hearing by the owner of the vehicle or the owner of the land on which such vehicle is located. This request shall be made to the appropriate public body, agency, or officer within 10 days after the mailing of notice of intention to abate and remove the vehicle or at the time of signing a release pursuant to subdivision (c). If the owner of the land on which the vehicle is located submits a sworn written statement denying responsibility for the presence of the vehicle on his land within such time period, this statement shall be construed as a request for hearing which does not require the presence of the owner submitting such request. If such a request is not received within such period, the appropriate public body, agency or officer shall have the authority to remove the vehicle.

(f) The requirement that after a vehicle has been removed, it shall not be reconstructed or made operable, unless it is a vehicle which qualifies for either horseless carriage license plates or historical vehicle license plates, pursuant to Section 5004, in which case the vehicle may be reconstructed or made operable.

(g) Authorizing the owner of the land on which the vehicle is located to appear in person at the hearing or present a sworn written statement denying responsibility for the presence of the vehicle on the land, with his reasons for such denial. If it is determined at the hearing that the vehicle was placed on the land without the consent of the landowner and that he has not subsequently acquiesced in its presence, then the local authority shall upon which the vehicle is located or otherwise attempt

to collect such cost from such owner.

Amended Stats 1983 ch 372 § 1.

Amendments:

1983 Amendment: (1) Added subd (c); (2) redesignated former subds (c)-(g); (3) substituted the first and second sentences of subd (d) for the former first sentence of subd (c); and (4) added "or at the time of signing a release pursuant to subdivision (c)" at the end of the second sentence of subd (e).